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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 674

SKUBS, v/s MAUDE BAKKE,

Petitioner,

OTIS McALLISTER & CO., a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No.

SKIBS, A/S MARIE BAKKE,
Petitioner,

v.

OTIS, McALLISTER & CO., a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on October 10, 1958.

Citations of Opinions Below

The Order dated May 15, 1956, of the District Court overruling respondent's exceptions to the answer to the libel is reported at 1956 AMC 1307 and is printed at page 39 of the Transcript of Record.

The Order for Decree of the District Court for the Northern District of California, Southern Division, dated November 22, 1957, is reported at 1958 AMC 1972 and is printed at page 39 of the Transcript of Record.

The Opinion of the Court of Appeals delivered on October 10, 1957, unreported to date, is printed in Appendix A hereto.

Jurisdiction

The Judgment of the Court of Appeals was entered on October 10, 1958. This Petition for a Writ of Certiorari is filed less than ninety days after the judgment was entered. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Question Presented

Does the Carriage of Goods by Sea Act, 1936, hereafter COGSA, abrogate the long-established rule that "true valuation clauses" are legal clauses in contracts for the carriage of goods by sea, as was the settled law under the Harter Act and under the general maritime law prior to the Harter Act?

Statutes Involved

Carriage of Goods by Sea Act, 46 U.S.C. Section 1303(8):

> "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect."

Carriage of Goods by Sea Act, 46 U.S.C. Section 1304(5):

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in

connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier. By agreement between the carrier, master, or agent of the carrier, and the shipper, another maximum amount than that mentioned in this paragraph may be fixed: provided, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage acually sustained . . . ."

The Harter Act, 46 U.S.C. Section 190:

"It shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect."

The Harter Act, 46 U.S.C. Section 191:

"It shall not be lawful for any vessel transporting merchandise or property from or between

ports of the United States of America and foreign ports, her owner, master, agent or manager to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided."

Statement

A shipment of coffee was carried from Callao, Peru, to San Francisco, California, aboard the M.S. MARIE BAKKE, under a bill of lading containing, among others, Clause 18 providing in its relevant parts that:

> "it is agreed that in view of the difficulty of determining in advance what the market value of the goods will be upon arrival at destination, the 'agreed value' thereof . . . shall be an amount equal to the shipper's invoice value, if any, . . . plus . . . freight, insurance and duties, . . . irrespective of whether any other value is greater or less, and in case of loss of, or damage to, or in connection with such goods, the carrier's liability, if any, shall be determined on the basis of such 'agreed value', . . ." (Finding of Fact VII, Tr. 43)

The shipment sustained loss and damage during ocean carriage. Respondent, as owner of the coffee during the voyage, invoking the Admiralty jurisdiction of the District Court (28 U.S.C. 1333), commenced the libel to recover damages for loss and damage to the shipment. Petitioner's answer-

to the libel alleged that the amount of damages should be determined by reference to Clause 18 of the bill of lading. Respondent's exceptions to the answer, alleging that Clause 18 of the bill of lading was invalid under the Carriage of Goods by Sea Act, 1936, were overruled by Order of the District Court dated May 15, 1956 (Tr. 30). The case was thereafter submitted on an Agreed Statement of Facts (Tr. 31). It was agreed that the f.o.b. invoice value of the coffee in question plus freight and insurance and duties was $00.4979 per pound, and that the sound market value of such coffee at the time and place of delivery was $00.5475 per pound (Tr. 34). Petitioner admitted liability for shortage of 162 pounds of coffee and for damage to 71,097 pounds of coffee, which damaged coffee sold for $31,468.62, with costs amounting to $1,117.80.

On November 22, 1957, the District Court entered its Order for Decree (Tr. 39) and on December 4, 1957, entered Findings of Fact and Conclusions of Law (Tr. 40) and its Final Decree (Tr. 46). The decree was for damages measured by reference to Clause 18 of the bill of lading which the Court held was a "true valuation clause" and not a clause of limitation and did not contravene the requirements of the United States Carriage of Goods by Sea Act, 1936. Respondent appealed the decree on the sole issue of the validity of Clause 18 of the bill of lading. On October 10, 1958, the Court of Appeals for the Ninth Circuit entered its order reversing the District Court. The opinion and judgment of the Court of Appeals are found in Appendix A hereto.

REASONS FOR GRANTING THE WRIT

1. The Issue Involved in this Case is of Great Importance to the Entire Maritime Industry and to the Marine Insurance Industry, Both in the United States and Abroad.

The Court of Appeals holds a traditional ocean bill of lading clause invalid. It is the customary provision fixing the method of determining the value of cargo in calculating the damages recoverable from an ocean carrier. For a great many years such true valuation clauses have appeared in the ocean bills of lading of substantially every United States steamship operator and most foreign steamship operators.[1] We agree with the following statement made by Proctors for the Institute of Marine Underwriters of the United States[2] in this case:

> "The Carriage of Goods by Sea Act governs the liability of common carriers with respect to all foreign shipments to or from the United States by sea. Many carriers subject to the Act have inserted in their bills of lading 'invoice value clauses' similar to that used by appellee. So far as we can ascertain no appellate court has yet passed upon the validity of such clauses under the Act. The decision herein will therefore affect not

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[1] The Court of Appeals' opinion indicates that agreements on value were first authorized by the Harter Act, thereby modifying the prior law which COGSA then restored. This is incorrect. The Harter Act did not initiate the validity of these clauses. They were in use and held valid long before 1893. As an example, this Court mentions favorably a clause "making the value of the goods at the place and time of shipment the measure of the carrier's liability" which appeared in a maritime bill of lading issued in 1874. *Phoenix Ins. Co.* v. *Erie and Western Trans. Co.*, 117 U.S. 312, 322 (1886).

[2] Messrs. Bigham, Englar, Jones & Houston, of New York, in their Motion For Leave to File Brief Amicus Curiae filed in the Court of Appeals.

> only the particular importer and carrier involved, but all importers, exporters, carriers, and their agents, throughout the United States, who engage directly or indirectly in foreign commerce by water. Similarly, it will be important not only in the coffee trade, but in connection with every type of commodity which enters or leaves the United States by ship."

The true valuation clause involved herein is substantially identical to those found in all ocean bills of lading. Consequently, the decision of the Court of Appeals cannot be limited to the particular clause it considered and will affect practically every ocean bill of lading currently in use by any steamship operator, American or foreign, trading in foreign commerce to or from the United States.[3] In fact, the ultimate decision in this case will affect ocean carriers' liabilities throughout the world since the pertinent statutes, COGSA sections 3(8) and 4(5) are part of the American enactment of the so-called Hague Rules[4] which have been adopted by most of the maritime nations of the world. The practices of many years standing in the adjustments of claims for loss or damage to cargo are also invalidated by the Court of Appeals' decision.[5]

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[3] In Appellant's Opening Brief in the Court of Appeals, respondent said:

> "There being no prior appellate decision on the precise point involved, the decision of this Honorable Court will be of great importance to everyone connected with the shipment and carriage of merchandise to and from United States ports in foreign commerce."

[4] The International Convention for the Unification of Certain Rules Relating to Bills of Lading (Brussels, 1924)

[5] Typical of the long established customs and relationships between importers and ocean carriers which will be upset is the "Green Coffee Agreement" relating to the coffee trade involved in this case (Findings of Fact X and XI; Tr. 20-23)

Any change in the long settled practice of agreeing on the method of fixing the value of cargo in the computation of damages at invoice cost plus disbursements will also affect the entire marine insurance industry. As Proctors for the Institute of Marine Underwriters of the United States[6] also stated:

> "The extent of common carrier liability is of direct concern to cargo underwriters who normally must bear those losses for which the carriers need not respond. For that reason the Institute of Marine Underwriters of the United States is vitally interested in the interpretation of the Carriage of Goods by Sea Act."

It also concerns the protection and indemnity underwriters who must respond for the ocean carriers' liabilities. The premiums charged by cargo underwriters and by protection and indemnity underwriters have been established, in part, upon this agreed method of calculating value and upon the loss experience of the underwriters under that practice.

The decision of the Court of Appeals would substitute the uncertainty of fluctuating markets for the preexisting certainty of shippers' actual costs (invoice value, freight, insurance and duties) and will require reexamination and recalculation of the premiums to be charged by both types of underwriters.

This Court has established the validity of true valuation clauses under the Harter Act which still governs the coastwise and intercoastal trade of the United States.[7] The decision of the Court of Appeals would therefore establish a divided rule under which true valuation clauses are in-

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[6] See Footnote 2.

[7] The Carriage of Goods by Sea Act applies in these trades only if the parties specifically contract that it shall. Some coastwise and intercoastal bills of lading so provide; many do not.

valid in foreign commerce but valid in coastwise and intercoastal commerce.

Even in the absence of conflict between Courts of Appeals, this Court in *United States* v. *Atlantic Mutual Ins. Co.*, 343 U.S. 236 (1951) *(The ESSO BELGIUM)* agreed to review a provision customarily found in ocean bills of lading because of the importance of the question. The "Both to Blame" clause considered in *The ESSO BELGIUM* was significant only in cases governed by American law.[8] The significance of the true valuation clause involved here is not so limited. Its validity and use in all ocean commerce throughout the world where the Hague Rules apply will be determined by the decision of this Court.

It is respectfully submitted that the importance of the issue presented in this case calls for the invocation of the reviewing jurisdiction of this Court.

2. The Decision of the Court of Appeals is Directly in Conflict with the Applicable Decisions of this Court as to the Nature and Validity of True Valuation Clauses and as to the Criteria to be Considered in Determining Whether the Carriage of Goods by Sea Act Modified the Established Rule of Law Existing Before its Passage.

The judgment of the Court of Appeals is inconsistent with the applicable decisions of this Court in the regards mentioned above, the inconsistencies being matters of admiralty law of general application throughout the entire shipping and marine insurance industries. There are no

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[8] Practically all maritime nations adopted the Brussels Collision Convention of 1910 providing that the damages caused to cargoes shall be borne by the colliding vessels in proportion to their respective degrees of fault. The United States did not adopt it, and under the rule of *The CHATTAHOOCHEE*, 173 U.S. 540 (1899) a different result followed under American law. The "Both to Blame" clause was designed to correct this difference and was therefore only significant where American law applied. (See Griffin, *The American Law of Collision* (1949) pp. 562-563).

issues of fact in this case and only questions of law are presented. The Court of Appeals' decision will not be factually distinguishable from any other case involving a true valuation clause.

The decisions of this Court have clearly established the very real difference between a limitation clause on the one hand and a true valuation clause on the other. The leading case is *ANSALDO SAN GIORGIO I* v. *Rheinstrom Bros. Co.*, 294 U.S. 494 (1935) which describes a limitation clause as one which

> "recites that a sum named in the bill of lading is the agreed value of the goods, or their value per unit or per package, in the absence of the shipper's declaration of a higher value; that the rate is fixed with reference to the specified value and if a greater be declared a higher rate will apply; that in consideration of the rate to be charged, the *carrier's liability for loss or damage shall be limited to the stipulated value. In case of loss or damage this clause inures to the carrier's, but not to the shipper's benefit.* The latter can in no event recover more than his actual loss, but may have to take much less. The damages are computed in the usual way without reference to the stipulation, but, if when so computed they exceed the agreed limit of value, no recovery of the excess may be had." (Emphasis added)

The same decision then describes a "true valuation clause":

> "The other is a true valuation clause. It is to the effect that in event of loss or damage for which the carrier is liable, the same shall be computed on the basis of the value of the goods at the place and time of shipment. Such a provision may benefit the shipper if the goods depreciate prior to the time for delivery by the carrier, and may lessen the carrier's normal liability if they should appreciate prior to that time."

The distinction is confirmed in *Smith* v. *The FERNCLIFF*, 306 U.S. 444 (1939) where, referring to a true valuation clause, the Court said:

> "*The clause in question prescribes a measure of recovery rather than limits the amount which may be recovered when loss or damage occurs.* For a long time, in the absence of a controlling statute, fraud or imposition, such provisions in bills of lading have been recognized as valid by this and other Federal courts. Also by many—perhaps a majority—of the state courts." (Citing cases) (Emphasis added)

The distinction between these two entirely different clauses was recognized by the District Court. It found the clause in issue a valid "true valuation clause" and not a clause of limitation.[9] The Court of Appeals did not challenge the District Court's conclusion, but it simply ignored the distinction and held the clause invalid under COGSA Section 3(8) because it did not conform to the requirements of Section 4(5), which is the section governing limitation provisions.

The Court of Appeals thus tested the legality of true valuation clauses by the standards applicable only to limitation clauses. This conflicts directly with the holding of this Court in *The FERNCLIFF*, supra.

In that case, as here, a true valuation clause was challenged as illegal because it did not conform to the then standard for validity of a limitation clause.[10] In disposing

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[9] Order of May 15, 1956 (Tr. 30); Conclusion of Law II (Tr. 45)

[10] Before COGSA and under the Harter Act limitation clauses were valid only if "tied to the rate" by allowing the shipper a choice of rates corresponding with different limitations (*The ANSALDO SAN GIORGIO I*, supra). COGSA substituted a new standard for validity of limitation clauses by requiring that they could not *limit* recovery to less than $500 per package. (COGSA Section 4(5).)

of the first specific question certified to it, this Court held that a true valuation clause was valid even though it did not conform to the standard for validity of a limitation clause.[11] It reached this conclusion even though damages based on market value at destination would have been $11.00 per ton and the true valuation clause operated to fix damages at $7.00 per ton—a difference of over 30%. Despite this disparity between the two measures of damages this Court said that the "clause in question prescribes a measure of recovery rather than limits the amount which may be recovered when loss or damage occurs."

Depending on the particular facts of each case, a true valuation clause may operate either to increase or decrease the recovery a cargo owner would have received if damages had been calculated on market value at destination.[12] Both in *The FERNCLIFF* and in this case it operated to decrease the recovery. Yet the Court of Appeals here condemns the clause for that very reason, saying it violates Section 4(5) of COGSA. This conflicts directly with the unequivocal holding in *The FERNCLIFF* that the validity of true valuation clauses is not judged by the standards governing limitation clauses.

The FERNCLIFF also considered whether the operation of the true valuation clause violated the prohibition of Section 1 of the Harter Act against bill of lading provisions by which the carrier shall be "relieved from liability for loss or damage arising from negligence, fault or failure" in performing its duties. This Court adopted the statement

[11] The question certified by the Court of Appeals in that case was: "Is an invoice cost valuation clause [true valuation clause], such as that here involved, inserted in a marine bill of lading without offering a choice of rates to a shipper, valid and binding upon the parties?" This Court answered "Yes, where there has been no fraud or imposition." *The FERNCLIFF*, supra, at 447, 451. No element of fraud or imposition exists, or has even been suggested, in the circumstances of this case.

[12] *The ANSALDO SAN GIORGIO I*, supra; *The FERNCLIFF*, supra.

that: "The clause we are dealing with does not appear to operate in that way [i.e., to relieve the carrier from the consequences of its negligence']."

Summarizing, the true valuation clause before this Court in *The FERNCLIFF* did not meet the then requirements (being "tied to the rate") for validity of a limitation clause, and it operated to fix the recoverable damages at a figure much less than the recovery would have been if calculated on market value at destination. The true valuation clause in this case did not meet the current requirements governing limitation clauses (COGSA Section 4(5)), and it had the same effect on recoverable damages. *The FERNCLIFF* held the clause valid; the Court of Appeals here held it invalid.

No distinction in wording between the two litigated valuation clauses is even suggested to justify the diametrically opposite result. The only intervening change in law is the enactment of COGSA which establishes a statutory, rather than judicial requirement for validity of *limitation* provisions and combines the pertinent provisions of Sections 1 and 2 of the Harter Act in one paragraph (Section 3(8)).

The substitution of one requirement governing limitation provisions for another cannot explain the conflict between the Court of Appeals' holding and *The FERNCLIFF*. No explanation of that conflict remains unless Congress in adopting the rewording of Sections 1 and 2 of the Harter Act as Section 3(8) of COGSA intended to make a material change in the law.

Section 1 of the Harter Act prohibited clauses relieving a carrier from liability for failure to perform its duties to cargo, and Section 2 prohibited clauses which would lessen, weaken or avoid the carrier's obligations to perform those duties. These sections were amalgamated into Section 3(8) of COGSA, which prohibits clauses relieving the carrier

from liability for failure to perfom the same duties or lessening such liability otherwise than as permitted in COGSA. The conflict between the holding in the Court of Appeals here and in *The FERNCLIFF* cannot be explained on the regrouping of words in the process of amalgamation. The Harter Act's proscription against relieving from liability is neither expressly nor impliedly limited to *total* relief. There are degrees of relief from anything. The word "relieve" must be given its normal meaning. The upiversally accepted first meaning of "relieve" is "to free, wholly or partly, from" something painful, oppressive, burdensome, disagreeable, etc., and listed synonyms include "alleviate" and "lessen".[13] Hence liability can be "relieved" by 30 percent as well as by 100 percent. "Lessening" by 30 percent is also "relieving" by 30 percent.

It follows that the Harter Act's prohibition against clauses relieving from liability necessarily forbids partial relief, or "lessening", as well as total relief. Consequently, the Harter Act prohibits clauses "lessening" liability just as much as COGSA does. But the language of *The FERNCLIFF* is clear that a true valuation clause does not involve any kind of relief at all, either partial or total, from liability for the consequences of negligence.[14] It is obvious that the reasoning and the result reached by this Court in *The FERNCLIFF* would have been no different if the Harter

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[13] Webster's New International Dictionary of the English Language, 2nd Edition, 1949; Funk & Wagnalls New Standard Dictionary of the English Language, Medallion Edition, 1940; Britannica World Language Dictionary, Funk & Wagnalls Co. 1956.

[14] That the clause "prescribes a measure of recovery rather than limits the amount which can be recovered" and "does not appear to operate . . . 'to relieve the carrier from the consequences of its negligence'." This language is particularly significant in view of the arguments made to the Court (83 L. Ed. pp. 863-864).

Act had prohibited a "lessening of liability" by express terms instead of by necessary implication from the normal meaning of the word "relieved." [15]

Therefore, the difference in the phraseology used in the Harter Act as compared to COGSA cannot reconcile the holding of the Court of Appeals below with the diametrically opposite holding in *The FERNCLIFF* unless, using the criteria established by this Court, it is found that Congress intended to change the long-established prior law and believed it was doing so when it enacted Section 3(8) of COGSA.

It is abundantly clear that Congress had no thought whatever that the words of COGSA Sec. 3(8) in any way changed the preexisting American law.[16] For instance, the House Committee on Merchant Marine and Fisheries had before it a detailed analysis of the proposed legislation, section by

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[15] The Court of Appeals infers that this Court in *The FERNCLIFF* believed a different result would obtain under COGSA because this Court quoted the words of the District Court: "The particular question is not likely to arise again as the subject is now regulated by" COGSA. The Court of Appeals inserts "[of invoice value]" to describe the "question" involved. But the "question" in *The FERNCLIFF* was *not* the validity of true valuation clauses or "of invoice value." That had already been established. The "question" was whether such clauses *had to be "tied to the rate"* like limitation clauses. COGSA had created an entirely different set of rules governing limitation clauses in Section 4(5). Obviously, after COGSA, whether a limitation clause or any other clause was "tied to the rate" became immaterial. *This* was the "question" before the Courts in *The FERNCLIFF* and to which the quotation refers. Significantly, the Court of Appeals in *The FERNCLIFF*, clearly stating what "question" it was talking about, said, "Notwithstanding the passage of [COGSA] the question as to the correct method of computing damages under a valuation clause is deemed an important one, as to which an authoritative decision would seem desirable."

[16] Except to the extent that it expressly outlawed "benefit of insurance" clauses.

section, prepared by the Department of Commerce. With respect to Sections 3(7) and 3(8) it stated:

> "No change of existing law except that by the latter 'benefit of insurance' provisions in bills of lading are nullified . . ."[17]

This Court in *The ESSO BELGIUM*, supra, definitively stated the criteria to be applied in determining whether COGSA had changed the maritime law with respect to a particular bill of lading provision from what it had been before COGSA was enacted. *The ESSO BELGIUM* established that the "language and the hearings of [COGSA]"[18] should be examined to see if "Congress intended to alter the Harter Act in any respect material to [the] controversy"; or, if Congress indicated any "purpose to bring about a change in the long-existing relationships and obligations between carriers and shippers which would be relevant to the validity of" the clause in question; or, to carve "out a special statutory exception to the general rule" as it had existed before.

The Court of Appeals here completely ignored the question of Congressional intent, thus bringing itself into direct conflict with *The ESSO BELGIUM* and with the language, there quoted with approval, of *The KENSINGTON*, 183 U.S. 263, 268-269 (1902).

Two interesting comparisons illustrate the conflict between the Court of Appeals here and the decision of this Court in *The ESSO BELGIUM*.

1. The Congressional hearings on COGSA are full of argument about the "Both to Blame" clause which was at issue in *The ESSO BELGIUM*. Cargo interests argued that the clause would be invalid under Section 4(3) but urged

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[17] Hearings before the Committee on Merchant Marine and Fisheries, House of Representatives, 74th Congress, Second Session, page 11.

[18] All quoted language in this paragraph is from the decision of this Court in *The ESSO BELGIUM*, 343 U.S. at 240-241.

an amendment to make it certain;[19] steamship interests resisted the amendment, contending the clause would be valid under COGSA;[20] the amendment was not made. This Court held the legislative purpose was equivocal and insufficient to show Congressional purpose to change the preexisting law under which the "Both to Blame" clause was invalid. In contrast, the same Congressional hearings, beyond indicating that Section 3(8) did *not* change the law (except as to "benefit of insurance") are silent on true valuation clauses.[21] Consequently there is even less reason to believe Congress intended to change the prior law as to true valuation clauses. Yet the Court of Appeals here ignores the legislative history while holding that COGSA completely reversed the well settled prior law concerning true valuation clauses.

2. The reasoning and result reached by the Court of Appeals in this case is in conflict with both the majority opinion in the *ESSO BELGIUM* and the minority opinion as well. As applied to this case, *both* opinions point to the same result. Congress did not intend COGSA to change the rule under the Harter Act. The parties should be permitted to enter into private business agreements which substitute value at place of shipment (plus freight, insurance and duties) for value at destination as "the measure of recovery" in the event of loss. This Court has often said such arrangements do not offend any public policy.[22]

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[19] House Hearings, supra, pp. 52-53.

[20] Ibid, 55-59.

[21] Sometimes, referring to Section 4(5) and "per package" limitations, references to "value", "agreed valuation", "valuation clauses", etc. appear (Id., pp. 25, 60; Hearing Before the Committee on Commerce, United States Senate, 74th Congress, First Session, on S. 1152, pp. 32, 37) but the words are not used as words of art and it is clear, in context, that the reference is to *limitation* provisions, not to "true valuation clauses" of the kind in issue here.

[22] *The ANSALDO SAN GIORGIO I*, supra; *The FERNCLIFF*, supra; *Chicago RR Co.* v. *McCaull-Dinsmore Co.* 253 U.S. 97 (1919) (where Mr.

It is respectfully submitted that the conflicts between the ruling of the Court of Appeals below and the decisions of this Court warrant the grant of certiorari in this case.

Conclusion

The issue presented in this case is whether the adoption of the Hague Rules and their enactment as COGSA invalidated a clause which has for a very great many years appeared in substantially all ocean bills of lading, and which this Court had previously approved as valid and consistent with American public policy.

Acceptance of the case and determination of the issue by the court of last resort of the United States will settle the question not only for all who are engaged in foreign commerce to and from the United States, but also for the entire maritime industry of the world.

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

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Justice Holmes recognized "the convenience of the clause and the arguments in its favor" but held it invalid under the specific prohibition in the Cummins Amendment which was applicable to railroads and expressly not applicable to ocean carriers.)

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15,940

Oct. 10, 1958.

OTIS McALLISTER & Co., a corporation, Appellant,

vs.

SKIBS, a/s Marie Bakke, Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division

Before: STEPHENS, Chief Judge, and DENMAN and BARNES, Circuit Judges

DENMAN, Circuit Judge:

Appellant, an importer of coffee from Callao, Peru to San Francisco, hereafter Importer, appeals from a decision holding valid an invoice valuation provision in the bill of lading for coffee carried in the Motorship Marie Bakke. It it agreed that the amount recoverable for appellee's admitted negligence in the carriage of the coffee, causing a loss of part of it and injuring some of it, would be lessened under this provision by $3,555.83 below that recoverable if the damage were based on the value on arrival at San Francisco.

The pertinent part of the bill of lading proviso so held valid, reads:

> "With respect to goods of an actual value not exceeding $500 lawful money of the United States per package . . . it is agreed that . . . shall be an amount equal to the shipper's *invoice* value . . . plus . . . freight, insurance and duties . . . irrespective of whether any other value is greater or less, and in case of loss of, or damage to, or in connection with such

goods, the Carrier's liability, if any, shall be determined on the basis of such 'agreed value' . . . and pro rata in case of partial loss or damage . . ." [Emphasis added.]

The importer contends, and we agree, that this provision of the bill of lading lessening the liability for negligence below that based on destination value is "null, void and of no effect" under Section 3(8) of the Carriage of Goods by Sea Act, hereafter COGSA, providing:

> "(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, *or lessening such liability otherwise than as provided in this chapter*, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability." [Emphasis added.]

The only lessening of liability provided in that act is that in its section 4(5) to an amount not exceeding $500.00 per package. That section provides:

> "(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.
>
> "By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum

amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained."

Here there was no declaration of a higher value in the bill and no agreement about another greater maximum amount.

In the admiralty proceeding of the American Trading Co. v. Steamship Harry Culbreath, 1952 A.M.C. 1170 the United States District Court for the Southern District of New York reached a similar conclusion as to an identical clause, confirming an excellent opinion of the Commissioner which summarized the prior decisions, including its prior decision in the George E. Pickett, 1948 A.M.C. 453.

What COGSA does is restore the basis of recovery for the usual carriage of goods to the value at the point of destination as it was at common law and in admiralty before the Harter Act. St. Johns Corp. v. Companhia Geral, etc., 263 U.S. 119, 125.

Subsequently under the Harter Act the carrier and importer could contract for an "agreed value" of the cargo carried which might lessen the carrier's liability below that based upon value at destination. Smith v. Ferncliff, 22 Fed. Supp. 728, affirmed by the Supreme Court, 306 U.S. 444 (1939), which at page 449 endorses the reasoning of the District Court that,

> "In operation the clause only eliminates prospective profit, and limits the damage to the owner's actual loss in the transaction. It may even operate to his advantage if the market value at destination is less than the invoice value . . . the [invoice value] clause as here worded is not against public policy and should be given effect."

However, COGSA had become effective in the United States on April 16, 1936, after performance of the contract to carry Smith's goods by the FERNCLIFF, and the court,

referring to its holding of the *then* validity of the FERNCLIFF's valuation clause, significantly states at page 450:

> "The particular question [of invoice value] is not likely to again arise as the subject is now regulated by the Carriage of Goods by Sea Act, § 4(5), 46 U.S.C.A. § 1304(5)."

Three years after the HARRY CULBREATH decision, the same rule was announced by the Exchequer Court of Canada in a case arising under the English Carriage of Goods by Sea Act 1924. Nabob Foods Ltd. v. CAPE CORSO (owners), 1954 Lloyd's Law List Reports, Vol. II, p. 40. The case is persuasive authority since the pertinent parts of the English and American statutes are identical, both having been derived from the Brussels Convention of 1924. In addition, the Canadian Court reached its decision largely on the basis of American cases construing COGSA there being no English or Canadian cases in point.

The valuation clause under discussion provided, like appellee's clause herein, that the value of cargo

> "shall for the purpose of avoiding uncertainties and difficulties in fixing value be deemed to be the *invoice value*, plus freight and insurance if paid, irrespective of whether any other value is greater or less. . . ." [Emphasis added.]

In issue was the validity of the foregoing clause under the English Act which provides, like our own, that

> "8. Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules shall be null and void and of no effect." (1954 Lloyd's Law List Reports, Vol. II, p. 41.)

After quoting from the Harter Act the Canadian Court distinguished the cases decided thereunder and held:

> "But all that aside and apart from authority, looking at Clause 9 of our Bill of Lading, I find it impossible to say that this clause is not directed to liability; and, moreover, is not a clause that in this particular case lessens liability. As I have pointed out, except under special agreement, liability is for the arrived sound market value. It may be, though I need not decide the point, that if this Bill of Lading declared that the arrived sound market value was to be taken at £900, that would govern, even though I might conclude that the real market value was £1000. However, this Clause 9 does not say anything like that. It purports to substitute for the arrived market value something entirely different; in other words, an entirely new measure of damages for the common law measure. In this case that measure lessens the carrier's liability, and so in my view the clause cannot be given effect to."

There is no merit in the carrier's contention that the "lessening" of liability for negligence provision of COGSA, § 3(8) is the same as the provisions of Section 1 of the Harter Act that carriers may not make any agreement whereby "they shall be relieved from liability for loss or damage arising from negligence" and that because an invoice valuation is valid in determining loss under the Harter Act it is hence valid under COGSA. What the Harter Act was concerned with was the "obligation" of the carrier to handle the cargo safely as provided in Section 191, under which bills of lading could not have clauses,

> ". . . whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided."

What COGSA is additionally concerned with is the *liability for* damages which arises after the *obligation* to carry safely is breached.

The Supreme Court has held similarly as to railway bills of lading having provision for a valuation at the place of shipment, after the Cummins Amendment of March 4, 1915, providing that the carriers affected by the act:

> ". . . shall issue a bill of lading and shall be liable to the lawful holder for it 'for any loss, damage, or injury to such property . . . and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier . . . from the liability hereby imposed' and further that the carrier "shall be liable . . . for the full actual loss, damage, or injury . . . notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading . . ." 253 U.S. 97, 99.

The bill of lading provision was that "the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including freight charges if paid." The District Court held that the phrase "liable . . . for the full actual loss, damage or injury" meant the liability as at common law based on the value at destination and held the value at place of shipment clause was invalid. Chicago & St. Paul Ry. v. McCaull-Dinsmore Co., 252 Fed. 664, 666. The judgment was affirmed by the Court of Appeals in 260 Fed. 835 and by the Supreme Court in 253 U.S. 97.

The judgment is reversed.

(Endorsed:) Opinion. Filed Oct. 10, 1958.

PAUL P. O'BRIEN,
Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15,940

OTIS McALLISTER & Co., a corporation, Appellant,

vs.

SKIBS, a/s Marie Bakke, Appellee.

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Decree of the said District Court in this cause be, and hereby is reversed, with costs in favor of the Appellant and against the Appellee.

IT IS FURTHER ORDERED and adjudged by this Court, that the Appellant recover against the Appellee for its costs herein expended and have execution therefor.

(Endorsed) Judgment

Filed and entered: October 10, 1958

PAUL P. O'BRIEN,
Clerk.

(3329-0)

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Office Supreme Court, U.S.
FILED
JAN 22 1959
JAMES R. BROWNING, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958.

No. 604

SKIPS, A/S MARIE BAKKE,
Petitioner,
vs.
OTIS, McALLISTER & CO., a Corporation,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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In the Supreme Court
OF THE
United States

October Term, 1958

No. 604

Skibs, A/S Marie Bakke,
Petitioner,

vs.

Otis, McAllister & Co., a corporation,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW.

The opinion of the Court of Appeals was dated October 10, 1958 and is reported at 260 F. (2d) 181. With this addition respondent adopts the Citations of Opinions Below appearing in the Petition.

QUESTION PRESENTED.

Whether a common carrier subject to the Carriage of Goods by Sea Act, 1936 may utilize an invoice value clause to reduce its liability to an amount less than the actual damages suffered, as measured by the traditional rule of market value at destination.

STATEMENT.

Petitioner, as a common carrier of goods for hire, received a shipment of coffee in good order and condition at Callao, Peru, issued its bill of lading therefor, and agreed to carry the coffee on its vessel Marie Bakke to San Francisco and to deliver it there in the same good order and condition as when received. Upon the arrival of the vessel at San Francisco petitioner failed to deliver 162 pounds of the shipment and delivered 71,097 pounds thereof in a damaged condition due to contamination by a foreign substance during transit. Respondent, the owner of the coffee during the voyage, filed suit for the damage and loss which resulted. Petitioner admitted liability but reserved the right to try the issue of whether respondent's damages should be computed with reference to invoice value or market value. The foregoing facts appear in the agreed statement (Tr. 31) and were so found by the District Court (Tr. 40).

Petitioner claimed that its liability should be limited to invoice value by virtue of an "invoice value clause" in its bill of lading (Tr. 9). Respondent took the position

that the Carriage of Goods by Sea Act prohibited any clause, agreement or other device seeking to limit or restrict liability for cargo damage other than as expressly provided by the Act. It filed exceptions (Tr. 28) seeking to have the bill of lading defense stricken. The District Court overruled the exceptions (Tr. 30) and the case proceeded to trial on the agreed statement. The trial court followed the pre-trial ruling, held the clause valid, and ordered a decree based upon invoice value (Tr. 39).

On appeal, the Court of Appeals for the Ninth Circuit held the clause invalid under Cogsa and reversed the District Court (App. A of Petition, p. 25). The decision held respondent entitled to recover its actual damages, based on market value, rather than damages based on the invoice which were $3,555.83 less.

ARGUMENT.

Section 3(8) of the Carriage of Goods by Sea Act, 1936 prohibits clauses which *relieve* a carrier from liability for cargo damage or which *lessen* such liability otherwise than as provided in the Act. There is no provision in the Act for an invoice value clause. Applying the clause to the facts of this case would lessen petitioner's liability by $3,555.83. The Court of Appeals held that such a result is prohibited by Cogsa. The basic simplicity of the case cannot be obscured by petitioner's efforts to create conflict where none exists or to inflate the importance and impact of the decision below.

I. THERE IS NO CONFLICT OF DECISION.

The Court of Appeals has held petitioner's invoice value clause void as one lessening liability in a manner not sanctioned by the Carriage of Goods by Sea Act. In so holding, the Court stated expressly that Cogsa has changed the rule of decision which obtained under the Harter Act. It is therefore surprising to find petitioner asserting conflict between that decision and *The Ferncliff*, 306 U.S. 444, which was decided twenty years ago *under the Harter Act.* The claim of conflict is even more surprising in view of the dictum in the *Ferncliff* opinion which clearly foreshadowed the result herein and which was relied upon by the Court of Appeals in reaching its decision. In upholding an invoice clause under the Harter Act, this Court noted that "The particular question is not likely to again arise as the subject is now regulated by the Carriage of Goods by Sea Act . . ." (306 U.S. at p. 450).

The Harter Act provided in general terms against clauses *relieving* the carrier from liability for negligence. It said nothing about valuation or measure of damages. Carriers devised various forms of clauses which had the effect of limiting or measuring cargo recoveries by reference to the invoice value instead of the market value, which is customarily higher. In the absence of any statutory guide, the courts were forced to develop their own rules of policy by which to judge the validity of such clauses. The result was a steady stream of litigation as the carriers designed new clauses to take the place of those which were declared invalid. That unsatisfactory situation, among others, led to the enactment of

Cogsa in 1936. The new Act is much more comprehensive than Harter. Where Harter said nothing about valuation, Cogsa covers it specifically, by providing a statutory valuation (46 U.S.C. Section 1304(5); Petition, pp. 2-3) and by prohibiting clauses relieving the carrier from liability "*or lessening such liability otherwise than as provided in this Act . . .*" (46 U.S.C. 1303(8), Petition, p. 2, emphasis added). Section 1304(5) and the quoted language from Section 1303(8) are entirely new and have no counterpart in the Harter Act. Their obvious purpose was to put an end to the litigation over valuation clauses by enacting a statutory clause and outlawing all others. That purpose was recognized by the *Ferncliff* dictum, quoted above, which pointed out that the question of invoice valuation had been laid to rest by Cogsa.

The second decision with which petitioner asserts conflict is *United States v. Atlantic Mutual Ins. Co.*, 343 U.S. 236 (1952) (*The Esso Belgium*) (Petition, p. 16). That case had nothing to do with damages or valuation, but was concerned with the "both to blame" clause which purported to create an affirmative obligation on the part of cargo to indemnify the carrying vessel. Obviously there can be no "direct conflict" between that case and this.

We understand petitioner's argument to be that certiorari is justified here because the Court of Appeals "completely ignored the question of Congressional intent" and thus departed from the rule of the *Esso Belgium*. That argument is perplexing. The first place to look for Congressional intent is the language used in the statute. The Court of Appeals, in a unanimous

opinion, examined and discussed the pertinent provisions of Cogsa, section by section, and held that the intent to outlaw petitioner's clause was clearly defined by the language used. In reaching its conclusion the Court had before it the hearings and reports of both the Senate and the House, material which was discussed extensively in the briefs of both parties. The committee proceedings refer to "valuation" and "limitation" clauses (using the terms interchangeably) and clearly indicate that no such clause will be valid unless in accord with the express provisions of Cogsa.[1] In the Department of Commerce memorandum submitted to the House Committee, (referred to on pages 15 and 16 of the Petition) it was stated that the maximum value feature of the bill "*prohibits the fixing by contract of even the actual value if that is under $500.*" (*House Hearings*, p. 14, emphasis added). The Committee was thus advised that Cogsa would prohibit the very type of clause which petitioner seeks to defend. The legislative history confirms the clear meaning of the language in the Act. To say that Congressional intent was "completely ignored" is preposterous.

In *The Esso Belgium* the situation was quite different. The Act said nothing about the problem there involved and the legislative history was inconclusive. The difference between the invoice value clause and the both to

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[1] *Hearing before the Committee on Commerce*, United States Senate, 74th Congress, First Session, on S. 1152, page 37; *Hearings before the Committee on Merchant Marine and Fisheries*, House of Representatives, 74th Congress, Second Session, on S. 1152, pages 14, 25, 60, 88; *House Report No. 2218*, 74th Congress, Second Session, pages 6-7.

blame clause is that Congress legislated in one field but not in the other. As with the *Ferncliff*, there is no conflict of decision but rather a statutory difference, which is no ground for certiorari.

It is an admitted fact that no conflict exists between the Court of Appeals' decision and any other decision by any court dealing with valuation clauses under Cogsa. We are aware of no case upholding any such clause, and petitioner cited none in the petition or in the courts below. On the contrary, all valuation clauses which have come before the courts under Cogsa have been uniformly condemned, including two which were virtually identical with petitioner's clause. Those two were held void in *American Trading Co. v. SS Harry Culbreath*, 1952 A.M.C. 1170 (S.D.N.Y. 1951) and *Nabob Foods Ltd. v Cape Corso* (owners), 1954 Lloyds Law List Reports, Vol. II, p. 40 (Exchequer Court of Canada). The Canadian case was decided under the English Carriage of Goods by Sea Act 1924, but, as pointed out in the Court of Appeals' opinion, (Petition, p. 22) it is persuasive authority since the statutes are identical, both having been derived from the Brussels Convention of 1924. In addition there is a closely analogous decision by the Second Circuit, *Pan-Am Trade & Credit Corp. v. The Campfire*, 156 F. (2d) 603 (1946), condemning a clause on cargo valuation as one lessening liability otherwise than as provided in the Act. Certiorari was denied (329 U.S. 774).

The *Ferncliff* rule has been changed by legislative action. The change was recognized by the *Ferncliff* dictum. The Court of Appeals' decision is consistent with

that dictum, and with the holdings of those jurisdictions which have passed upon the validity of valuation clauses under Cogsa. There is no conflict which warrants the granting of the writ.

II. THE PETITION OVERSTATES THE IMPORTANCE OF THE CASE.

Respondent concedes that the case has a degree of importance to those directly involved in the carriage of goods by sea in foreign commerce, and to their underwriters. Whether it involves a question of substantial public interest within the certiorari jurisdiction of this Court, however, is open to doubt.

Petitioner's quotes from respondent's brief below, and from other non-record material, have been taken out of context and are therefore misleading. The decision of the District Court, in upholding a clause previously condemned by the *Harry Culbreath* and *Cape Corso* decisions (supra, p. 7) had created an intolerable situation. If permitted to stand, it would have meant that the clause was valid on the Pacific Coast even though it was invalid in New York and Canada. The "importance" of the case in the Court of Appeals was to correct the error of the District Court and restore the intended uniformity under Cogsa and the Hague Rules. That result has now been accomplished.

The statement (Petition, p. 7) that the Court of Appeals' decision invalidates long-standing practices in claims adjustment does not bear analysis. Neither that decision nor Cogsa says anything about claims adjust-

ments, and the parties to a bill of lading dispute are as free as they ever were to settle cases on whatever terms may seem expedient. The Court of Appeals does hold that the carrier may not avail itself of an invalid clause when its liability is the subject of determination by a court of law. Far from being a departure from "long settled practice," that decision is in accord with unanimous authority from other jurisdictions.

If petitioner wishes to complain of the "divided rule" (Petition, pp. 8-9), under which invoice value clauses are invalid under Cogsa but valid under the Harter Act, its complaint should be directed to Congress. The foregoing is only one of several differences between the two statutes. The 1936 Act also changed the rules concerning time to file claim and suit, burden of proof, and the effect of unseaworthiness. The differences are not surprising, since a prime reason for the passage of Cogsa was to correct abuses and inequities which had developed under the Harter Act, and thus to achieve, in the field of foreign shipping, uniformity with those nations which had adopted the Hague Rules.

Unlike other bill of lading cases in which certiorari has been granted, this case does not call for a definition of policy or for the statement of a general rule which would be relevant to a dispute arising outside its four corners. All that is at issue is the validity of a particular clause, a question of insufficient moment to warrant review by this Court.

III. THE DECISION BELOW IS CLEARLY CORRECT.

A carrier's liability for loss or damage to goods normally is based upon market value at destination. *Ansaldo San Giorgio I v. Rheinstrom Bros. Co.*, 294 U.S. 494 (1935). Ocean carriers have long sought to avoid that rule by the use of clauses lessening their liability from market value to invoice value or other artificial measure. These clauses assumed various forms, even though their intended effect was the same—to lessen the carrier's liability. Prior to Cogsa their validity was determined by whether the particular language used constituted a "valuation clause" or a "limitation clause." *Ansaldo San Giorgio I*, supra; *Ferncliff*, supra. The desire for a more equitable rule contributed to the enactment of Cogsa in 1936.

The 1936 Act laid down a *statutory* rule on valuation of cargo (46 U.S.C. Section 1304(5)), by virtue of which Congress preempted the field and deprived the carriers of their pre-existing power to control the subject by bill of lading clauses. Having done that, Congress then made its intention clear by providing in Section 1303(8) that no other device lessening the carrier's liability would be permitted.

The solution adopted by Congress was a wise one. It replaced the vague guide of "limitation" versus "valuation" with the concrete test of the effect of a clause in a given case. If it lessens the liability it is void.

Petitioner is mistaken in claiming that the Court of Appeals "tested the legality of true valuation clauses by the standards applicable only to limitation clauses." (Petition, p. 11). The Court of Appeals properly ignored

the distinction between the two types of clauses, which is no longer controlling, and applied the Cogsa test by looking to the *effect* of petitioner's clause.

The source of petitioner's dissatisfaction is not the Court of Appeals' decision but the Act itself, which changed the prior law. Federal and international uniformity of decision in recognition of that change has now been established. Uniformity is evidence of correctness. Further review by this Court would serve no useful purpose.

CONCLUSION.

That the petition for certiorari should be denied for the foregoing reasons is

Respectfully submitted,

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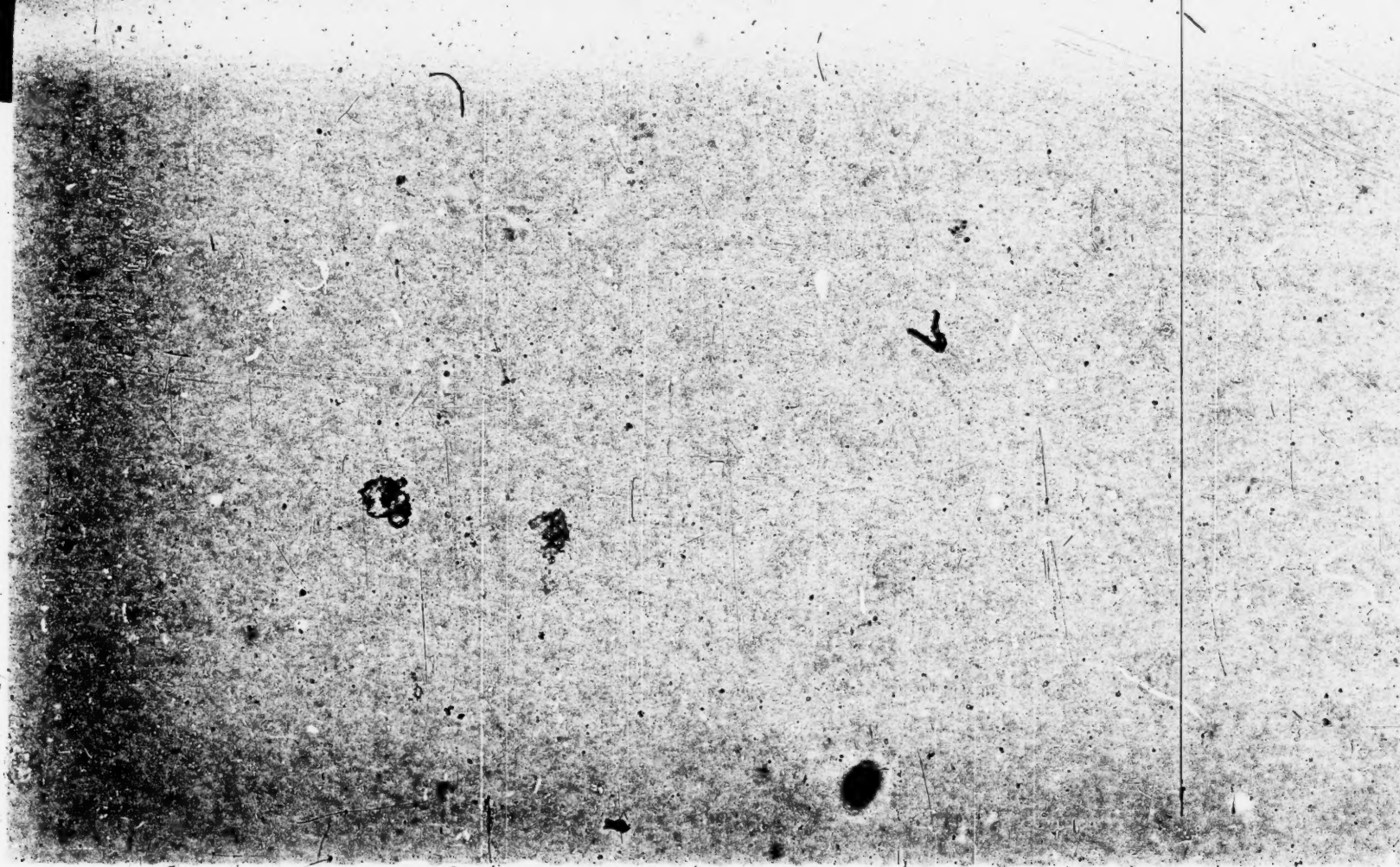
Dated, January 20, 1959.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 604

SKIBS, A/S MARIE BAKKE,

Petitioner,

vs.

OTIS, McALLISTER & CO., a Corporation,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

AND

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1958.

SKIBS, A/S MARIE BAKKE,

Petitioner,

vs.

OTIS, McALLISTER & Co., a Corporation,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*.

Grace Line Inc., Isthmian Lines, Inc., States Marine Corporation and United States Lines Company hereby respectfully move this Court for leave to file the attached brief as *amici curiae* pursuant to Rule 42, Paragraph 1, in support of the petition for certiorari filed on or before December 29, 1958. The consent of the petitioner to the filing of such brief has been obtained, but the respondent has refused its consent.

The question involved is whether our Carriage of Goods by Sea Act, 1936, 46 U. S. C. 1300 et seq., which applies to shipments from or to this country in foreign trade renders bill of lading "invoice clauses" invalid. The Court of Appeals, reviewing the District Court, held such a clause invalid.

Thus the interpretation of a Federal Statute is involved.

Such clauses are found in the vast majority of all ocean bills of lading, domestic and foreign. For many years

carriers had expected to adjust and have adjusted claims for loss or damage to goods on that basis.

Indeed, there is great practical advantage in a carrier's being in a position to adjust claims on the basis of invoice value. That value is usually fixed and appears from the claim file. If sound market value be the test uncertainty and dispute will or may result and cause delay and difficulty in the adjustment of claims.

The question of the validity of such clauses not only affects carriers in foreign trade, their underwriters, but importers and exporters throughout this country and their underwriters.

In *Model Ocean Bill of Lading* by *Deutsch*, published subsequent to the Act, it is said at page 164:

> "The most usual provision, aside from a limitation to a fixed value per package or unit, is one limiting the carrier's liability to invoice valuation or fixing the value of the merchandise for the purpose of determining the carrier's liability at the invoice value."

Such a clause is inserted in what the author considered a model bill of lading appearing in his book.

The Warshiplading, 1942, used for the carriage of goods on merchant vessels operated for the Government account by the War Shipping Administration and its agents and later by the National Shipping Authority and its agents contained an invoice value clause with respect to goods of a value of less than $500 per package or other freight unit. *Knauth, Ocean Bills of Lading*, pages 93, 106.

An illustration of the importance of the question can readily be seen from the following quotation from the motion filed in the case at bar, in the Court of Appeals for leave to file a brief *amicus curiae* on behalf of the Institute

of Marine Underwriters of the United States, "a nation-wide organization composed of virtually all marine insurance companies in the United States who write insurance on cargo moving to and from this country by sea."

> "• • • The decision herein will therefore affect not only the particular importer and carrier involved, but all importers, exporters, carriers and their agents, throughout the United States, who engage directly or indirectly in foreign commerce by water. • • •
>
> "The extent of common carrier liability is of direct concern to cargo underwriters who normally must bear these losses for which the carriers need not respond. For that reason the Institute of Marine Underwriters is vitally interested in the interpretation of the Carriage of Goods by Sea Act. • • •"

The effect of these clauses comes into play daily in the handling and negotiation of claims between shippers, consignees, marine underwriters and carriers.

This Court, in *U. S. A.* v. *Atlantic Mutual Ins. Co. et al.*, 343 U. S. 236, granted certiorari to determine the validity of the so-called "Both-to-Blame" clause in bills of lading, stating at page 239 of its opinion in the case:

> "• • • deeming the question of sufficient importance to justify our review, this Court granted certiorari."

We submit the very important question here involved should be settled by this Court.

The interest of the proposed *amici curiae* is that they are steamship companies engaged in domestic and foreign commerce, and all issue bills of lading containing "invoice value" clauses in some form. Thus the decision of the

Court of Appeals below declaring the invoice value clause invalid under the United States Carriage of Goods by Sea Act, 1936 seriously affects them, as well as the whole of the maritime industry engaged in the carriage of goods by water.

The *amici curiae* move this Court for permission to file the annexed brief to emphasize the importance of the question here involved and to point out additional reasons why certiorari should be granted by this Court.

WHEREFORE, it is respectfully submitted that the movants be permitted to file the annexed brief as *amici curiae* in support of the petition for certiorari.

Dated, New York, N. Y.
December 29th, 1958

Respectfully submitted,

L. DEGROVE POTTER,
Counsel for
Grace Line Inc.,
Isthmian Lines, Inc.,
States Marine Corporation,
United States Lines Company.

JAMES MCGARRY,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM 1958.

SKIBS, A/S MARIE BAKKE,

Petitioner,

vs.

OTIS, McALLISTER & Co., a Corporation,

Respondent.

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI.

The question involved here is whether the Carriage of Goods by Sea Act, 1936, 46 U. S. C. 1300 et seq. (hereinafter referred to as COGSA) prevents the parties to an ocean bill of lading from agreeing that in the event that the carrier is liable for cargo loss or damage that the value of the goods will be based on their invoice value; or whether COGSA has rendered null and void invoice value clauses which this Court has held to be valid under the Harter Act in *Smith v. The Ferncliff* (1939), 306 U. S. 444.

The *amici curiae*, Grace Line Inc., Isthmian Lines, Inc., States Marine Corporation and United States Lines Corporation, have a deep interest in the resolution of this question since they all issue bills of lading containing "invoice value" clauses.

THE FACTS.

The respondent, an importer, sued for damage occurring to his cargo, on board the petitioner's vessel on a voyage

from South America. The District Court rendered a decree for respondent and computed the damages based on an invoice value clause in the bill of lading, which the District Court held to be valid. On appeal, the Court of Appeals for the 9th Circuit reversed the District Court and held that the invoice value clause was one lessening the carrier's liability for negligence and was null and void under Section 3 (8) of COGSA.

ARGUMENT.

The question of the validity of invoice value clauses under COGSA is one of great importance to the whole maritime industry. Invoice value clauses in some form are contained in the bills of lading of all the *amici curiae*, which are among the world's large ocean cargo carriers, and are engaged in cargo carriage to various parts of the world.

Additionally, the undersigned represents many other foreign, as well as domestic, steamship companies to most, if not all, of whom the decision of this question is of importance. Furthermore, the Warshiplading form, which has been the uniform bill of lading for the War Shipping Administration and the National Shipping Authority and its agents, as found in *Knauth* on *Ocean Bills of Lading*, 4th Ed., pp. 93 to 109, contains, at pp. 105 and 107 an invoice value clause. One also appears in Deutsch's "Modern Ocean Bill of Lading".

Clearly then, the clause involved in the case at bar is not merely one of importance to the litigants. It is one which affects the maritime industry as a whole, in the area of cargo carriage. The decision of the validity of this clause under COGSA will affect all ocean carriers in foreign commerce with respect to any shipment touching United States shores since COGSA governs both inbound and outbound shipments.

Under the decision of the court below the effect of an "agreed valuation" type of invoice value clause will prevent the carrier from "lessening" its liability, but if the invoice value be greater than sound market value (the measure of damage in the absence of agreement) cargo may contend the carrier has agreed to increase its liability which it may do. So, the only effect of the clause would be to increase the carrier's liability in some cases. Many invoice value clauses, are of this type. Certainly this was not the purpose or intent of carriers in inserting such clauses.

Also the effect of the decision below would result in such clauses being invalid in foreign trade, but valid in coastwise trade as the Act only applies to foreign trade. Such a result is quite unwarranted.

Since these invoice value clauses affect the measure of damage in the event ocean carriers are liable for cargo loss or damage, the validity of such clauses must also be of vital importance to cargo shippers, consignees, and marine underwriters.

It is imperative that ocean carriers be apprised of the efficacy or validity of such clauses, especially in view of the fact that such clauses appear in the great majority of their bills of lading. Doubt on the efficacy of such clauses can lead only to increased difficulties and roadblocks in the speedy disposition of claims with resultant increased litigation.

Therefore, it is submitted that these *amici curiae*, whose activities are national and international in scope have demonstrated the overwhelming importance of the question presented and the necessity that this Court finally set at rest this question which involves the interpretation of a Federal Statute and therefore grant certiorari.

We shall not include in this brief detailed argument as to the correctness of the Court of Appeals' decision reversing the District Court but nevertheless we submit the decision of the Court of Appeal is wrong. The last pronouncement of this Court on invoice value clauses was in the case of *Smith* v. *The Ferndiff* (1939), 306 U. S. 444. In that case, this Court held such a clause to be valid. Although COGSA had been passed and was in effect at the time of this Court's decision, the case arose prior to the effective date of COGSA and under the Harter Act.

The late Charles S. Haight, in testifying before the Committee on Merchant Marine and Fisheries of House of Representatives, 74th Congress, 2d Session, Bill S. 1152, January 28, 1936 (p. 71), in hearings on COGSA, quoted Judge Hough as saying:

> "If I had undertaken to codify the American law myself, I could not have done a better job."

It is significant that while the Act expressly prohibits a "benefit of insurance" clause [§3 (8)] it does not prohibit a limitation of liability to invoice value with respect to goods of a value less than $500 per package or customary freight unit.

Prior to the passage of the Act such clauses were valid. If Congress had intended to invalidate such clauses it would have been very simple to have so provided in the Act. A few words would have sufficed. The fact that Congress did not so provide is convincing evidence that it did not intend to prohibit such clauses, particularly having in mind their long and almost universal use.

This Court has never passed upon the question whether COGSA has invalidated invoice value clauses or changed the law that existed under the Harter Act. Therefore, the only outstanding decision of this Court on the question of

invoice value clauses is *The Ferncliff, supra,* and that case held such clauses to be valid. If, in fact, COGSA has changed the law from that as found in the *Ferncliff* case, which is by no means admitted, it is submitted that this Court should now decide the question, particularly since it is one of great importance to all connected with the shipment and carriage of goods by water in foreign commerce to and from ports of the United States.

This Court has recently granted certiorari on similar questions or questions dealing with the effect or interpretation of COGSA.

In *Robert C. Herd & Co.* v. *Krawill Machinery Corp.* (4 Cir., 1958), 256 F. (2d) 946, this Court recently granted certiorari on October 13, 1958, 1958 A. M. C. 2327, on the question of whether or not the $500 per package limitation of the Carriage of Goods by Sea Act, 46 U. S. C. §1304 (5) and a similar provision contained in a bill of lading applies to a stevedore.

This Court has also granted certiorari on October 13, 1958, 1958 A. M. C. 2327 on the question of the validity of a bill of lading clause providing that suits for cargo damage were to be brought only in Genoa, Italy. *Carbon Black Export* v. *The SS. Monrosa* (5 Cir., 1958), 254 F. 2d 297.

It is submitted that the question involved here is of, at least, equal, if not of greater importance to the industry than the questions involved in the above cases.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be granted.

Respectfully submitted,

L. deGrove Potter,
Counsel for
Grace Line Inc.,
Isthmian Lines, Inc.,
States Marine Corporation,
United States Lines Company.

Dated, New York, N. Y.,
December 29th, 1958

James McGarry,
Of Counsel.

FILE COPY

MOTION FILED JAN 26 1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 604

SKIBS. A/S MARIE BAKKE,
Petitioner

v.

OTIS, McALLISTER & CO., a corporation,
Respondent.

MOTION UNDER RULE 42 (1) FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

AND

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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MOTION UNDER RULE 42 (1) FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

American President Lines, Ltd., one of America's largest steamship companies, presently operating 27 vessels in Trans-Pacific and round-the-world services essential to the foreign commerce of the United States under the Merchant Marine Act of 1936, as amended, is gravely concerned with and adversely affected by the ruling below of the United States Court of Appeals (260 F. 2d 181), and respectfully suggests that the Federal maritime question involved is of such importance to the American Merchant Marine, and so affects the foreign commerce of the United States, as to warrant the granting of (a) the petition for a Writ of Certiorari, and (b) this motion for leave to file a brief *amicus curiae*.

Consent of petitioner has been given to the filing of a brief *amicus* by American President Lines, Ltd., but the respondent has refused its consent.

Squarely at issue is the bald question whether a bill of lading clause (in respect of goods worth less than $500 per package or customary freight unit), similar to those heretofore declared by this Court to be valid "true valuation clauses" for measuring cargo damages is outlawed by the U. S. Carriage of Goods by Sea Act, 1936.

The time taken for the issue to reach this Court is no reflection on its importance. It may be explained by the fact that although the valuation clause is involved in the great majority of multitudinous cargo claims filed against ocean carriers, and although the amounts involved in the aggregate are exceedingly large, nevertheless the individual claims involving application of the valuation clause, separately considered, rarely involve large amounts. For example, the amount involved in the instant "test case" is $3,555.83. When we multiply this illustrative claim by the hundreds of similar claims filed against American President Lines,

Ltd., as only one carrier, every year, the importance of the issue becomes apparent.

A further important consideration here involved has a direct bearing on judicial administration in the United States. By voiding the true valuation clause in petitioner's bill of lading, similar to such clauses in the bills of lading of American President Lines and other carriers, the Court of Appeals has opened the floodgates for litigation of literally thousands of relatively small cargo damage claims. The decision below would suppress practical, fair, simple and uncontroversial methods of measuring the value of goods by their invoice cost, plus insurance, freight and duties, as provided in the valuation clause.

Shippers and carriers, by reason of the decision below, are left to argue over, take testimony with respect to, and litigate as a fact to be determined in each instance (by conflicting evidence of fluctuating "markets", "expert testimony", and other varying or ephemeral circumstances) the actual "sound market value" of particular goods at the time when delivery was or should have been made at destination. Surely no sound judicial or public policy calls for any such result. Nothing in the 1936 Act (COGSA) here invoked by respondent calls for any such conclusion.

The true valuation clause relieves both parties to the contract of carriage from speculative factors and market fluctuations which, in the absence of the clause, cause one or the other of the parties to suffer solely in consequence of market conditions over which neither have any control. The clause measures the value of goods, and the shipper's damages, on the basis of the shipper's actual out-of-pocket expenses. The clause removes the elements of speculation and uncertainty and tends to stabilize freight and insurance

rates. It is consistent with the commercial practice of shippers and consignees in respect of cargo valuations for insurance purposes.

C. I. F. is the customary commercial measure of indemnity between shipper and consignee (or buyer and seller) in the ordinary transaction involving shipment of goods. (The carrier is not an insurer, but only liable for faults specified in COGSA). This commercially accepted measure of indemnity (by way of insurance) is equally appropriate and fair when spelled out in the bill of lading contract for application in circumstances where the carrier is liable to the goods owner for faults not excused by COGSA. Whether the goods owner is paid by his insurance underwriter (as where there is no fault on the part of the ocean carrier), or by the ocean carrier (in circumstances where the carrier is responsible) C. I. F. is the fair, practical and customary method of indemnity.

Because of the importance of the Federal maritime question here involved, and because the brief *amicus* annexed hereto points to clearly the erroneous empirical conclusion of the Court of Appeals below not similarly discussed in the petition for writ of certiorari, movant respectfully requests the Court to receive and consider the annexed brief in support of the petition.

Respectfully submitted,

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Counsel for
American President Lines, Ltd.

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January 26, 1959.

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BRIEF AMICUS CURIAE OF AMERICAN PRESIDENT LINES, LTD. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Jurisdiction

Petitioner has invoked jurisdiction of this Court under 28 USC 1254 (1).

Statutes Involved

The statute involved is the U. S. Carriage of Goods by Sea Act, 1936 (46 USC 1300-1315), pertinent sections of which are quoted in the petition,

By the way of analogy the Harter Act of 1893 (46 USC 190-195) is also involved and its pertinent sections are quoted in the petition.

Question Involved

Is a "true valuation clause" similar to those heretofore declared valid (*Smith* v. *The Ferncliff*, 306 U. S. 444) in ocean bills of lading governed by the Harter Act of 1893, valid in ocean bills of lading which are governed by the U. S. Carriage of Goods by Sea Act of 1936?

The Facts

There is no dispute on the facts. Petitioner is a steamship company whose Motorship MARIE BAKKE carried a shipment of coffee from Peru to San Francisco. Petitioner's liability is conceded with respect to negligent loss of part of the shipment, and physical damage to another part. Respondent (libellant-appellant in the Court of

Appeals) was the coffee importer. Respondent took issue with the petitioner ocean carrier with regard to the validity of the following standard "true valuation clause" in the bill of lading contract covering the shipment:

> "it is agreed that in view of the difficulty of determining in advance what the market value of the goods will be upon arrival at destination (this being the common law basis of determining damages), the 'agreed value' thereof . . . shall be an amount equal to the shipper's invoice value, if any, . . . plus freight, insurance and duties . . . irrespective of whether any other value is greater or less . . ." (Tr. 43).

The current "market value" of the coffee in sound condition upon arrival of the MARIE BAKKE at destination was $00.0596 per pound higher than the f.o.b. invoice value plus freight, insurance and import duties. [Had the market value been lower per pound than the C. I. F. value the case would not have arisen.] Because the market value was higher than the C. I. F. value the importer (respondent) refused to accept indemnity from petitioner in keeping with the bill of lading clause. The importer claimed damages measured by market value, and characterized the bill of lading clause as invalid attempt by respondent to "limit" its liability in contravention of the U. S. Carriage of Goods by Sea Act. The District Court sustained the bill of lading clause (Tr. 46). The Court of Appeals reversed (260 F. 2d 181).

Reasons for Granting Writ

1. An important issue of Federal maritime law is involved affecting the foreign commerce of the United States and those directly concerned with it, including shipowners, marine insurance underwriters, exporters and importers.

For the benefit of the divers interests directly and indirectly concerned the issue, of long standing, should be decided authoritatively.

2. The decision of the Court of Appeals is contrary to prior decisions of this Court upholding just such clauses in bills of lading governed by the analogous Harter Act of 1893, which still applies to coastwise and intercoastal shipments.

3. The decision of the Court of Appeals opens up a vast floodgate of litigation by voiding a true and fair valuation clause and imposing upon the shipping and export-import industries a commercially rejected, difficult, expensive and indeterminate method of determining cargo damages in connection with individually small (under $500 per package) but numerically most extensive cargo claims.

4. The interests of effective judicial administration and the avoidance of a multiplicity of lawsuits with respect to a constantly recurring and now unsettled important Federal maritime question, warrant the granting of the petition for a writ of certiorari.

Argument

Supplementary to the matters stated in the petition, we believe that the clear error of the Court of Appeals below can be further demonstrated by brief discussion of (a) the background and purposes of the Carriage of Goods by Sea Act, and (b) the cases upon which the Court below appears to have relied as authorities for its conclusion.

I.

THE COURT BELOW HAS CONFUSED NEGLIGENCE CLAUSES PROSCRIBED BY THE STATUTES AND THE COURTS WITH TRUE VALUATION CLAUSES HERETOFORE APPROVED BY THIS COURT AND NOT PROSCRIBED BY THE STATUTES.

Before enactment of the Harter Act, 1893, the Federal and most of the State Courts had proscribed clauses in ocean bills of lading which attempted to exempt or lessen the carrier's common law liability for loss or damage occasioned by the carrier's negligence. Such "negligence clauses" were deemed invalid as contrary to public policy in the United States. Clauses falling under this proscription included those whereby common carriers attempted to lessen or avoid their liability for loss of or damage to goods in consequence of unseaworthiness, negligent stowage, care and custody of goods, and unexplained loss. Under the Harter Act of 1893 (still applicable to coastwise and intercoastal shipments) and under the 1936 Carriage of Goods by Sea Act (governing all bills of lading in foreign commerce of the United States), certain "negligence clauses" within the limited permissive scope of the statutes have been enforcible, subject however to exercise by the carrier of due diligence requirements (Viz.: 46 U. S. C. § 1304). Any attempt, however, by the carrier to avoid or lessen its substantive obligations or duties beyond the scope permitted in the statutes are declared void [Harter Act 46 U. S. C. §§ 190, 191; Carriage of Goods by Sea Act, 46 U. S. C. § 1303(8)].

Frequently confused with the "*negligence*" clauses proscribed or regulated by the Harter and Carriage of Goods by Sea act, but falling in a different category, is the so-called "*limitation of liability*" clause, limiting the amount of damages recoverable from the carrier after substantive liability has been established.

The Harter Act is silent with respect to such limitation agreements in bills of lading. Bill of lading limits of $100 per package were common before 1936. The Carriage of Goods by Sea Act, 1936, expressly limits the carrier's liability to an amount not exceeding "$500 per package". [46 U. S. C. § 1304(5)]. Under the Harter Act, limitation clauses were declared valid so long as the shipper had an option of declaring a higher valuation upon payment of a higher freight rate. Under the Carriage of Goods by Sea Act the limitation is set by statute at a maximum of $500 per unit "unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading" [46 U. S. C. § 1304(5)]. In short the Carriage of Goods by Sea Act provides for a fixed maximum limitation of $500 per package in lieu of the more flexible "released rate" limitation clauses theretofore considered valid.

With respect to goods valued at less than $500 per package, the Carriage of Goods by Sea Act, like the Harter Act, is silent. The clause at issue in the instant case deals only with the *measure of damages* with respect to such goods. *It is neither a "negligence clause," nor a "limitation clause."* It is, rather, a clause that has been approved by the Court and characterized as a *"true valuation clause."* Such clauses have been upheld consistently by the courts both before and after the enactment of the Harter Act, 1893. [See *Smith* v. *The Ferncliff* (1939) 306 U. S. 444; *cf. The Ansaldo San Giorgio* I (1935) 294 U. S. 494]. No special consideration or choice of rates is necessary to their validity. They measure *damages* (after *liability* has been determined) on the basis of the goods owner's actual damages, viz., cost, insurance, freight and duty, rather than by the speculative happenstance of ephemeral market conditions at time and place of delivery. Nothing in the Carriage of Goods by Sea Act prohibits such clauses; there is no policy or reason to justify invalidating any such clause by inference or otherwise.

II.

THE DECISION OF THE COURT OF APPEALS BELOW RELIES UPON UNSOUND OR DISTINGUISHABLE LOWER COURT CASES OF DOUBTFUL AUTHORITY.

Two decisions in the Southern District of New York, reported unofficially in American Maritime Cases (one of which is abortively so reported), provide the principal basis upon which the Court below appears to have reached its conclusion. Here is a perfect example of error being compounded by error. The Court cites as precedent the "excellent opinion" of a commissioner, affirmed without comment by District Judge Clancy, in the *Harry Culbreath*, 1952 A. M. C. 1170 (not officially reported). The commissioner, in turn, relied upon the unofficial report of the *George E. Pickett* (S. D. N. Y.) in 1948 A. M. C. 453. This case officially reported at 77 F. Supp. 998, involved claim for damages to hides. The carrier was held liable on the merits, and the official opinion of the District Court (Judge Ryan) contains no discussion of damages or the valuation question. In the unofficial A. M. C. report, however, there is gratuitously appended a "Statement" that the bill of lading involved was a War Shipping Administration (U. S. Government) form, known as a "Warshipbading", which contained a C. I. F. valuation agreement. The A. M. C. "Statement" (p. 456) indicates that an interlocutory decree was entered in favor of the libellant "for its damages based on the market value of the skins in sound condition at New York**." This, coupled with the unofficial A. M. C. headnote, p. 453, is misleading. Examination of the files in the District Court proceeding indicates that each of the bales exceeded $500 in value, and liability was limited to $500 per bale as to those totally lost. Four other bales, having a sound market value of 65¢ per skin, were damaged to an extent of 10%, on the basis of which

recovery was had in the sum of $260. The valuation clause was not at issue and was not discussed by the Court.

Other "authorities" relied upon the commissioner in the *Harry Culbreath* are equally distinguishable. E.g. *The Campfire* (2 Cir. 1946) 156 F. 2d 603, dealt with a "pro rata clause" and did not concern the question here involved. *Sanib* v. *United Fruit Co.* (S. D. N. Y. 1947) 74 F. Supp. 64, dealt with an invalid *limitation* clause, not with a *true valuation* clause such as here involved.

The Court of Appeals below, empirically following the *Harry Culbreath*, similarly cited in support of its conclusion the Canadian case of the *Cape Corso*, 1954 Lloyd's List L. R. (Vol. II) 40. There the learned Judge relied upon what he thought to be American law. Thus he observed, for example, "even in *Smith* v. *The Ferncliff*, the Supreme Court indicated quite plainly that the clause upheld under the Harter Act would have been bad under the new (COGSA) Act." The conclusion of the Canadian Court as to the opinion of this Court in *The Ferncliff* is, we submit, wholly unwarranted. The commissioner in the *Harry Culbreath* initiated the impression picked up by the Canadian Court, and in turn, the Court of Appeals below cited both as authority for its own stated conclusion that Mr. Justice McReynolds' *dictum* in *The Ferncliff* signified that an otherwise valid clause is rendered invalid by the 1936 Act. What Mr. Justice McReynolds said was:

> "The particular question (of invoice value) is not likely to again arise as the subject is now regulated by the Carriage of Goods by Sea Act, § 4(5) 46 USCA § 1304(5)." (p. 450)

We submit that this *dictum* is easily explained and was not intended as a ruling by this Court on the point now at issue. The *dictum* is traceable to an observation made by Judge Chesnut when *The Ferncliff* was before the District

Court. He had declared that the question was not likely to arise again, and spoke of it as "regulated" by the Carriage of Goods by Sea Act. (22 F. Supp. at pp. 742-3). In a later case he corrected or at least modified this impression. See *The Steel Inventor*, 35 F. Supp. 986, at p. 998. There he observed that while he did not have to decide the question, nevertheless a "true valuation clause" might still be valid under the 1936 Act! However, the "damage had been done". Judge Chesnut's *dictum* in *The Ferncliff* was picked up by the Court of Appeals for the Fourth Circuit which, in certifying the case to this Court, said:

> "Notwithstanding the passage of the Carriage of Goods by Sea Act of April 16, 1936 . . ., the question as to the correct method of computing damages under a valuation clause is deemed an important one, as to which an authoritative decision would seem desirable." (306 U. S. at p. 447).

By such slender threads has confusion been compounded. An authoritative decision by this Court on the question in respect of the Carriage of Goods by Sea Act, 1936 is, indeed, now desirable.

Considerations of brevity preclude further observations which could be made in like vein with regard to the "precedents" upon which the Court of Appeals below seems to have reached its conclusion. It is hoped that these few illustrations are sufficient to emphasize adequately the importance of the question, the confusion that has been engendered by the lower court rulings, and the great need for an authoritative ruling on the question by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FILE COPY

MOTION FILED FEB 6 1959

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 604

SKIBS, A/S MARIE BAKKE,
Petitioner,

versus

OTIS McALLISTER & CO., a Corporation,
Respondent.

MOTION UNDER RULE 42(1) FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

AND

BRIEF OF AMICI CURIAE IN SUPPORT OF WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1958

No. 604

SKIBS, A/S MARIE BAKKE,
Petitioner,

versus

OTIS, McALLISTER & CO., a Corporation,
Respondent.

MOTION UNDER RULE 42(1) FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Now come Lykes Bros. Steamship Co., Inc., Mississippi Shipping Company, Inc. and Gulf & South American Steamship Co., Inc., and respectfully move the Court for leave, under Rule 42(1), to file the attached brief as *amici curiae* in support of the petition for *certiorari* heretofore filed in these proceedings. Petitioner has consented to the filing of this brief, but respondent has refused to consent.

Movers are three of the principal steamship companies operating in foreign commerce out of United States Gulf ports. Lykes Bros. Steamship Co., Inc. operates a fleet of more than fifty vessels in regular liner service from United States Gulf ports to the United Kingdom and northern Europe, to the Mediterranean, to Africa, to the Far East and to the Caribbean. Mississippi Shipping Company, Inc. operates regular service out of the Gulf

to the east coast of South America and to Africa, having a fleet of fourteen vessels. Gulf & South American Steamship Co., Inc. operates a fleet of five vessels from the Gulf to the west coast of South America.

For many years, each of the movers has had in its regular ocean bill of lading a clause similar to or identical with the clause which the Court of Appeals for the Ninth Circuit has voided in the instant case. In the case of Lykes Bros. Steamship Co., Inc. and Mississippi Shipping Company, Inc., the clause in question long antedates the Carriage of Goods by Sea Act (1936), and in the case of Gulf & South American Steamship Co., Inc., the use of the clause in its bill of lading is coexistent with the life of the company, that is, over eleven years.

The question presented in this petition for the writ is one of prime importance to movers, invalidating, as it does, a clause long in use, and one which is reasonable, sound and in no way violative of any statute or of any public policy. The question is of great importance, not only to the movers, but also to the maritime industry generally, in that all or virtually all common carriers by sea use similar or identical provisions and have used them for years long antedating the passage of the Carriage of Goods by Sea Act (1936), in which act the opinion of the Court of Appeals in the instant case purports to find authority for invalidating them. The provision was inserted and used in the carefully prepared form of bill of lading worked out by the War Shipping Administration (WARSHIPLADING, 1942) in the carriage of goods aboard merchant vessels operated by or for the United States government; and later by the National Shipping Authority. The decision of the Court of Appeals

in the instant case thus very seriously affects the rights of movers and of the entire industry; and, if permitted to stand, will have an important and adverse effect on the adjustment of claims in ocean commerce.

Movers request the Court to be permitted to file the attached brief in order to emphasize the importance of the question, not only for themselves, but for the industry, and also to give them an opportunity to indicate to the Court additional reasons why movers believe that the writ should be granted. Therefore, it is respectfully submitted that movers should be permitted to file the annexed brief as *amici curiae* in support of the petition for a writ of *certiorari*.

Respectfully submitted,

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February 5, 1959.

TERRIBERRY, RAULT, CARROLL,
MARTINEZ & YANCEY,
Of Counsel

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 604

SKIBS, A/S MARIE BAKKE,
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versus
OTIS, McALLISTER & CO., a Corporation,
Respondent.

BRIEF OF AMICI CURIAE IN SUPPORT OF WRIT OF CERTIORARI

QUESTION PRESENTED

Was the universally recognized "C.I.F. valuation clause" (that is, the clause by which a cargo owner's damages are stipulated to be assessed on the basis of cost, insurance and freight) invalidated by any provision of the Carriage of Goods by Sea Act (1936), 46 U.S.C. 1300, *et seq.*?

THE FACTS

Respondent, the importer of cargo aboard petitioner's vessel to San Francisco from Callao, Peru, sued the carrying vessel for damage sustained by the cargo on the voyage.

There was no dispute about liability, but the only problem was the assessment of damages. The District Court, on the basis of the "C.I.F. valuation clause," awarded an amount predicated upon the actual damage which the respondent had sustained, that is, the cost of the merchandise plus the cost of transportation (freight, insurance and duties). On appeal, the Court of Appeals reversed, holding, without any sound basis, that the clause somehow "lessened" the carrier's liability for negligence and was therefore void under section 3 (8) of the Carriage of Goods by Sea Act.

ARGUMENT

As has already been pointed out hereinabove, the question is one of very genuine importance to movers, and in their judgment, to the entire shipping industry. The movers' principal purpose in desiring to be given permission to appear, is, as has been stated, to give them the opportunity to bring to the Court's attention the importance of the problem not merely for the litigants at bar, but also for the movers and for the industry as a whole. Accordingly, we shall not enter into any extensive argument on the merits, because it is not desired to burden the Court with what might be thought to be cumulation or duplication. We concur generally in the statements already made by petitioner and by the other *amici curiae*, and we submit that the decision of the District Court was correct and that of the Court of Appeals wrong.

With the Court's permission, however, there is one point which we desire to stress. In *The Ferncliff*, 22 F. Supp. 728, Judge Chesnut, of the District of Maryland, one of the

eminent admiralty judges of the century, made the comment, at pages 742 and 743:

> "' . . . The particular question is not likely to again arise as the subject is now regulated by the Carriage of Goods by Sea Act, § 4(5), 46 U.S.C.A. § 1304(5)."

This comment was quoted in the Supreme Court's affirmance and in its general approval of Judge Chesnut's language, 306 U.S. 450. The opinion of the Court of Appeals in the present case (Petition, app., p. 22) seems to treat this remark of Judge Chesnut's, approved by the Supreme Court, as indicating that the Carriage of Goods by Sea Act sets the question at rest adversely to the validity of the clause. We submit that there is no warrant whatsoever for such a conclusion; and, on the contrary, that precisely the opposite conclusion is the only correct one. The section of the act to which Judge Chesnut referred was *not* 3(8), *i.e.*, was *not* the section which, like the Harter Act before it, prohibits the lessening of the carrier's obligations. The section to which he specifically referred was 4(5), the section which, among other things, prevents the carrier from being liable for more than the "damages actually sustained." The act, section 4(5), 46 U.S.C., section 1304(5), the section to which Judge Chesnut referred as probably setting the question at rest, provides, in these words:

> " . . . In no event shall the carrier be liable for more than the amount of damage actually sustained."

Both Judge Chesnut and the Supreme Court, in *The Ferncliff*, correctly held that that was precisely what the invoice valuation clause did, *i. e.*, prevented the carrier from being liable for more than the actual damages sustained. Judge Chesnut said, 22 F. Supp. at page 742 (again quoted with approval by the Supreme Court, 306 U.S. at page 449):

> " . . . In operation the clause only eliminates prospective profit, and limits the damage to the owner's actual loss in the transaction . . . "

The act specifically provides that the carrier shall not be liable for more than "the amount of damage actually sustained," and the clause in question, as interpreted and approved in *The Ferncliff*, has precisely that effect, permitting the cargo owner to recover no more than his "actual loss in the transaction."

It must not be overlooked that the clause in fact operates to make the cargo owner entirely whole and under the act he is not entitled to more. It computes his damages on the basis of what he actually paid for the goods plus all the cost of carrying them to destination; that represents his "actual loss," the "amount of damages actually sustained," and represents a reasonable, sound, fair, and what is most important, an entirely legal measure of his damages.

One further comment, and we shall close. Sections 1 and 2 of the Harter Act, 46 U.S.C., Sections 190, 191, under which *The Ferncliff* was decided, provide that it shall not

be lawful for any carrier to insert in any bill of lading any clause whereby the carrier is "relieved" from liability for damage arising from negligence, fault or failure in proper loading, stowage, custody, care, or proper delivery of cargo; or any clause whereby the obligations of the carrier to exercise due diligence to make the vessel seaworthy or carefully to handle, stow, care for and deliver the cargo is in any wise "lessened, weakened, or avoided." *The Ferncliff*, decided under these provisions, held that the clause in question did not violate them. They had meanwhile found their way into section 3 of the Carriage of Goods by Sea Act, 46 U.S.C., section 1303, and particularly into paragraph 8 of that section, with no significant change of language. Absolutely nothing in section 3(8) can possibly justify a holding that a valuation clause, valid under sections 1 and 2 of the Harter Act, is invalid under section 3 (8) of the Carriage of Goods by Sea Act. The clause, valid under the Harter Act, is equally valid under the virtually identical language of the Carriage of Goods by Sea Act.

CONCLUSION

It is submitted that the question involved in the case at bar is one of very real importance to the industry, and that the decision of the Court of Appeals was wrong. Accordingly, it is submitted that the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

Jos. M. Rault

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Counsel for Lykes Bros. Steamship Co., Inc., Mississippi Shipping Company, Inc. and Gulf & South American Steamship Co., Inc.

New Orleans, Louisiana,
February 5, 1959.

TERRIBERRY, RAULT, CARROLL, MARTINEZ & YANCEY,
Of Counsel

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 604

SKIBS, A/S MARIE BAKKE,

Petitioner,

v.

OTIS, McALLISTER & CO., a corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER IN REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondent Misstates the Question Presented

The Brief for Respondent states that the "Question Presented" is whether a carrier subject to COGSA "may utilize an invoice value clause to reduce its liability . . . ." So stated, the question *assumes* that the clause does reduce liability. Yet the opinion of this Court in *The FERNCLIFF*, 306 U.S. 444 (1939), shows that it does not.

The FERNCLIFF said such a clause merely adopts "an agreed value as a measure of recovery for loss or damage . . ." and "prescribes a measure of recovery rather than limits the amount which may be recovered . . ." (306 U.S. at 448). More specifically, it " 'does not appear to operate in that way [i.e. "to relieve the carrier from the consequences of its negligence"]' " (306 U.S. at 449). The case holds that such a clause neither limits nor relieves liability.

Having assumed that the clause does what *The FERNCLIFF* says it does not, respondent then phrases the "Question Presented" in a way which answers itself.

This is not the question. The issue is whether respondent can escape the rule of *The FERNCLIFF* by avoiding or distinguishing it. Respondent cannot avoid it by predicating the "Question Presented" on an assumption which the rule of that case contradicts. The attempted distinction offered by respondent and by the Court of Appeals below cannot be justified. There are no differences in the pertinent parts of the Harter Act and COGSA sufficient to explain the diametrically opposed results (Petition, pp. 13-15). The legislative history of COGSA shows no congressional intent to change the well established prior rule, as is required by the standards set by this Court in *The ESSO BELGIUM*, 343 U.S. 236 (1951), and the complete silence of the Court of Appeals below on this issue cannot by any stretch of the imagination be interpreted, despite respondent's rather surprising argument (Brief, pp. 5, 6), as a finding to the contrary. Reliance on a dictum quoted in *The FERNCLIFF* (Brief, p. 4) proves to be entirely unwarranted when the "question" which was "not likely to again arise" is identified with the specific issue then before the Court. (This is treated in greater detail in the Petition p. 15, Footnote 15).

The operation and legal effect of a true valuation clause

established by the rule of *The FERNCLIFF* make such a clause as valid under COGSA as it was under the Harter Act. Application of the standard of statutory construction expressed in *The ESSO BELGIUM* shows that COGSA did not change the well settled prior law. These two cases should only be challenged directly. A foreign court or a lower Federal court should not evade the one by specious "distinction" and completely ignore the other. Such a direct challenge, which we welcome, can properly be made only in this Court.

Petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted,

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